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No. 86-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COOPER INDUSTRIES, INC.,
Petitioner,

v.

I.A.M. NATIONAL PENSION FUND
BENEFIT PLAN A, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE I.A.M. NATIONAL PENSION FUND, *et al.*, IN OPPOSITION

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RESPONDENTS' STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the court of appeals correct in holding that 28 U.S.C. § 1292(a)(1) authorizes immediate appeal only from orders granting or refusing motions for preliminary injunctions and orders having the same serious, perhaps irreparable, consequence as orders granting or refusing motions for preliminary injunctions?

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RESPONDENTS' STATEMENT OF THE CASE

Respondents commenced this action to compel the payment of withdrawal liability which they had assessed against petitioner pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* Respondents' complaint sought to collect only the first installment of petitioner's withdrawal liability, inasmuch as only that installment payment was past due at the time the complaint was filed. The complaint sought "judgment against defendants" in the amount of the then-delinquent installment payment, plus interest and liquidated damages on that amount, and

attorney's fees, all in accordance with 29 U.S.C. § 1399 (c) (5) and 29 U.S.C. § 1132(g) (2). It did not specifically request injunctive relief.[1]

Petitioner's answer admitted that respondents had assessed withdrawal liability against petitioner, and that the first installment payment required by that assessment had not been made when due. Petitioner alleged, however, that respondents' withdrawal liability calculation and assessment against it was incorrect because that calculation had included a facility petitioner had sold in ostensible compliance with MPPAA's "sale of assets" provisions, 29 U.S.C. § 1384. Petitioner asked the court to dismiss respondents' complaint and, in a counterclaim incorporated in its answer, to declare the assessment unlawful and permanently enjoin respondents from attempting to enforce it.

Both parties moved for summary judgment, and on June 25, 1985, the district court entered an opinion and order, Pet. App. B at 9a-13a, which addressed only respondents' motion. Concluding that MPPAA requires employers who have challenged a pension plan's assessment of withdrawal liability to pay the assessed withdrawal liability on the schedule established by the plan while the challenge is pending, the court ordered petitioner to pay respondents the then-past due withdrawal liability installment. In holding that MPPAA required payment of withdrawal liability "in accordance with the schedule set forth by the plan sponsor," 29 U.S.C. § 1399(c) (2), the court's June 25, 1985, order granted respondents full final relief on their claim for immediate payment. That order was interlocutory only in the sense that it did not finally dispose of all claims in the case.[2] In subsequent orders the

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[1] The complaint contained the standard prayer for "[s]uch other and further legal or equitable relief as the Court deems appropriate."

[2] The court did not characterize its order as preliminary, interlocutory, *pendente lite*, or in any respect temporary. Pet. App. B at 9a-13a.

court ruled, over respondents' objection, that even though petitioner had waived its statutory right to arbitrate its challenge to respondents' withdrawal liability assessment, it nevertheless remained free to litigate that challenge in court.[3] Having concluded that it was free to make a *de novo* determination of the correctness of respondents' assessment, the court further concluded that that assessment had been improperly calculated and could not be enforced. The court directed respondents to recalculate petitioner's withdrawal liability, and to refund from the installment payment petitioner previously made, any sum in excess of the newly-calculated withdrawal liability. *I.A.M. National Pension Fund v. Cooper Industries, Inc.*, 635 F. Supp. 335 (D.D.C. 1986).

Petitioner's attempt to take an interlocutory appeal from the June 25, 1985, order produced the opinion to which the instant petition is directed. Cross appeals from the district court's final order directing respondents to recalculate petitioner's withdrawal liability have been docketed. Pet. 3-4.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to reverse the court of appeals' dismissal for lack of jurisdiction of its appeal from the district court's grant of partial summary judgment to respondents. Petitioner claims reversal is necessary (Pet. 4) because the dismissal of its appeal "has denied a jurisdiction given to [the court of appeals] by Congress in 28 U.S.C. § 1292(a)(1) in clear and explicit terms." That error is, in petitioner's view (Pet. 5), rooted in the court of appeals' "misreading of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981),"

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[3] 29 U.S.C. § 1401(b)(1) provides in part that "[i]f no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor."

and the consequent erroneous promulgation by the court of appeals of a "new standard for determining the immediate appealability of an interlocutory injunction under 28 U.S.C. § 1292(a)(1)."

The only unauthorized "new standard for determining the immediate appealability" of such orders in this case is the one petitioner now urges upon this Court.[4] On petitioner's view of the scope of § 1292(a)(1), litigants would be entitled immediately to appeal from *any* injunction, whether or not that injunction had been issued upon a showing of a likelihood of irreparable harm preliminary to a determination of the merits. Because section 1292(a)(1) was never meant to confer such a right, and has never been so construed by this Court, the court of appeals' dismissal was quite correct. Petitioner points to no decision in which a different court of appeals has adopted the view it here espouses. Its claim (Pet. 7-8) that other courts' "confusion as to the meaning of *Carson*" requires this Court's review of this case bespeaks only petitioner's own confusion about the policy considerations upon which the general prohibition against piecemeal appeals is based. The petition should be denied.

1. Petitioner's confusion is readily identified in its articulation of the asserted "new standard" which it claims was erroneously imposed by the court of appeals. Thus petitioner characterizes the court of appeals' opinion (Pet. 5) as follows:

> Unless the district court order [from which interlocutory appeal is taken] results from a "specific re-

[4] So far as the court of appeals' opinion reflects, petitioner never argued in that court that it was not required to show that a "serious, perhaps irreparable, consequence," *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted), might result if no interlocutory appeal were available. The argument petitioner now commends to this Court's attention appears to be little more than an afterthought, prompted by the court of appeals' rejection of petitioner's attempt to meet the *Carson* test. *See* Pet. App. A at 5a-7a.

> quest for injunctive relief"—presumably, a motion for a preliminary injunction—the party enjoined must show that it will be "irreparably harmed" by the injunction in order to secure immediate review .... That standard misconstrues *Carson* and impermissibly restricts the Congressional grant of jurisdiction in § 1292(a)(1).

Under this formulation, according to petitioner, a litigant enjoined at any stage of trial court proceedings except in response to a motion for preliminary injunction faces an impediment to immediate appeal which is not imposed when the injunction results from such a motion. In fact, of course, the "new" standard to which petitioner objects is not new at all. Analytically, the distinction between an injunctive order entered in response to a motion for preliminary injunction and such an order entered after a merits determination, such as the grant of partial summary judgment at issue in this case,[5] is no more than a recognition that the former instance is one in which the movant must assert the danger of irreparable harm in support of his motion, while dispositive motions addressed to the merits of a claim do not require such a showing.

In *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), this Court noted that the "exception to the requirement of finality," *id.* at 180, represented by what is now 28 U.S.C. § 1292(a)(1), was evidently rooted in a Congressionally-perceived need

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[5] The court of appeals' conclusion (Pet. App. A at 4a) that the district court's June 25, 1985, order was an injunction may be open to question. That order commanded only that a partial withdrawal liability payment already past due and owing be paid. Pet. App. B at 9a. *Compare Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 171 (3d Cir. 1984) ("[T]he Fund requested . . . that the court compel Pantry Pride to make future payments according to the schedule in its prior demand which, construed liberally, is a request for an injunction.").

> to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.

Id. at 181 (footnote omitted). An interlocutory order entered in response to a motion for preliminary injunction is self-evidently an order "of serious, perhaps irreparable, consequence." Only upon a showing that irreparable harm may result before the merits of his claim can be determined will a movant be granted preliminary injunctive relief. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974); *cf.* Rule 65(b), Fed. R. Civ. P. (temporary restraining order may be issued only upon a showing "that immediate and irreparable injury, loss or damage will result to the applicant"). Thus, every district court order which results from a specific request for preliminary injunctive relief is, by definition, an order entered after the movant has shown (where the injunction is granted) or has unsuccessfully attempted to show (where the injunction is denied), "that it will be 'irreparably harmed'" (Pet. 5), if the injunctive relief it seeks is not granted. In these circumstances, but *only* in these circumstances, section 1292(a)(1) permits immediate appeal of such orders without any additional threshold showing of "irreparable harm" precisely *because* a showing of such harm is prerequisite to the granting of the preliminary injunction in the district court. Orders granting or denying such motions are thus *always*, by definition, "orders of serious, perhaps irreparable, consequence." *Baltimore Contractors*, 348 U.S. at 181.

It was surely this self-defining characteristic the court of appeals had in mind when it stated (Pet. App. A at 4a, n. 3) that

> *Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1).

While the court did not refer explicitly in this passage to specific requests for *preliminary* injunctive relief, examination of the authorities the court cited at this point confirms that the court's reference was to preliminary injunctions.[6] Petitioner, moreover, does not dispute this premise; it presumes (Pet. 5), correctly we believe, that the court's reference to a "specific request for injunctive relief" was, in fact, a reference to "a motion for a preliminary injunction."

As petitioner concedes, the order from which it appealed did not result from a motion for preliminary injunction, but from a motion for summary judgment. Pet. 5, n. 7; Pet. App. A at 3a, n. 2. Unlike a motion for preliminary injunction, which is based upon the movant's apprehension of suffering irreparable harm before his claim has been adjudicated, a motion for summary judgment seeks a final determination that the movant is "entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P., and does not depend upon a prerequisite claim of irreparable harm. Clearly then, the court of appeals' consideration of the "nature of the request for relief" is not, as petitioner suggests (Pet. 5-6), a meaningless subordination of substance to form. To the contrary, the "nature of the request" reliably informs the

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[6] *See Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1471 (11th Cir. 1985) ("[T]he district court *explicitly* denied Cable Holdings' motion for a preliminary injunction . . . . Hence, the interlocutory order in this case fits squarely within the plain language of § 1292(a)(1) and *Carson* is inapposite") (emphasis in original), and *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985), at 1173 ("A request for a permanent injunction does not have the emergency character of a request for a preliminary injunction, which requires the plaintiff to show that he will suffer irreparable harm if the request is denied"), and 1174 ("*Carson* interprets *Switzerland Cheese Ass'n* [*v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966)] to hold that an interlocutory order refusing a permanent injunction is appealable immediately if but only if the order has the same effect ('serious, perhaps irreparable, consequence . . .') as the denial of a preliminary injunction.").

appellate court whether the appeal is one which, by definition, implicates the "serious, perhaps irreparable, consequence," *Baltimore Contractors*, 348 U.S. at 181, necessary to establish appellate jurisdiction under § 1292(a)(1), or whether the court must independently determine whether such consequences are implicated. The teaching of the *Baltimore Contractors/Carson* synthesis is that the appellate court must, one way or another, be satisfied that interlocutory appeal is necessary to protect appellant against the prospect that adherence to the "rule of finality," *Baltimore Contractors*, 348 U.S. at 181, would expose it to "serious, perhaps irreparable, consequence," *id.* When the district court context is itself sufficient to satisfy this test, as it is whenever the order sought to be appealed is entered in response to a motion for preliminary injunction, no further inquiry by the appellate court is required to establish appellate jurisdiction. Otherwise, the *Carson* test must be applied by the appellate court before jurisdiction under § 1292(a)(1) is established. *Shanks v. City of Dallas*, 752 F.2d 1092, 1096-97 (5th Cir. 1985).

The analysis applied by the court of appeals was entirely consistent with the foregoing principles. Because the order from which petitioner sought to appeal was not entered in response to a motion for preliminary injunction, the court of appeals was obliged independently to determine whether that order nevertheless was one which

> might have a "serious, perhaps irreparable, consequence," and [which] can be "effectually challenged" only by immediate appeal.

Carson, 450 U.S. at 84. The court concluded and, indeed, petitioner conceded (Pet. App. A at 7a), that petitioner was not threatened with irreparable harm.[7] Thus com-

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[7] The court also concluded that petitioner could not meet the second prong of the *Carson* test. That conclusion is unassailable, as the pendency of the cross-appeals filed by petitioner and respondents from the district court's final order attests. *See* p. 3, *supra*.

pelled to concede its inability to demonstrate compliance with the *Baltimore Contractors/Carson* standards, petitioner now argues for the first time that those standards do not apply. The argument is clearly without support in any of this Court's decisions, and obviously is not worthy of the Court's attention.

2. Petitioner makes no claim that the court of appeals' decision is "in conflict with the decision of another federal court of appeals." U.S. Sup. Ct. Rule 17.1(a). The most that can be said of petitioner's argument on this point is that it claims inconsistency within the Court of Appeals for the District of Columbia Circuit and "confusion" within the Court of Appeals for the Third Circuit. Neither claim is sound.

Petitioner points first to the footnoted discussion of appellate jurisdiction in *Gomez v. Turner*, 672 F.2d 134, 138, n. 5 (D.C. Cir. 1982), as evidence of important disarray on this issue within the District of Columbia Circuit. The language in *Gomez* upon which petitioner relies does, indeed, appear to predicate jurisdiction under 28 U.S.C. § 1292(a)(1) of an appeal from an injunction granted on motion for summary judgment. There is, however, no suggestion in the court's opinion that jurisdiction was contested by the appellee. Nor, we think, is there any doubt that, had the *Carson* test been applied in *Gomez*, it would easily have been met. The district Court in *Gomez* had, on constitutional grounds, permanently enjoined the Metropolitan Police Department of the District of Columbia from engaging in the practice of making noncoercive pedestrian "contacts." *Gomez*, 672 F.2d at 138-39. While the injunction was in force therefore, District of Columbia police officers were restrained by its terms from conducting certain routine investigative interviews, and perhaps even from responding appropriately to emergency situations. Id. at 142-44, 146. The injunction in *Gomez* thus was plainly one which

> might have a "serious, perhaps irreparable, consequence," and [could] be "effectually challenged" only by immediate appeal . . . .

Carson, 450 U.S. at 84. The *Gomez* court's failure expressly to apply the easily-satisfied *Carson* test, when no challenge to its appellate jurisdiction had been raised, clearly does not require this Court to review the decision in this case, in which the court of appeals properly *did* apply the *Carson* standard.[8]

Nor does petitioner's claim of "confusion" (Pet. 7-8) within the Third Circuit require this Court's attention. *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), like this case, involved an injunction issued on a motion for summary judgment. Like the court of appeals in this case, the Third Circuit tested its own jurisdiction by independently inquiring into the threat of irreparable harm if immediate appeal were denied. *Id.* at 446-47. The court in *Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d at 170, with which petitioner attempts, Pet. 8, to contrast *Tokarcik*, conducted a similar inquiry. The *Tokarcik* court's statement, 665 F.2d at 447, that "appealability of a routine interlocutory injunctive order remains unquestioned," plainly refers to injunctions issued on motions for preliminary injunction,

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[8] Where, as in both *Gomez* and this case, the order appealed from finally disposes of one or more, but not all, claims in the action, and is interlocutory only in the sense that it leaves other claims unresolved, the question of immediate appealability might more appropriately be governed by Fed. R. Civ. P. 54(b). Not surprisingly, inasmuch as both § 1292(a)(1) and Rule 54(b) represent limited exceptions to the general rule of finality, the showing required under Rule 54(b) is closely analogous to the *Carson* test under § 1292(a)(1). *See Ansam Associates, Inc. v. Cola Petroleum Ltd.*, 760 F.2d 442, 445 (2d Cir. 1985); *Burlington Northern Railroad Co. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985).

as the court's citation to *Baltimore Contractors* attests.[9] *Tokarcik* and *Pantry Pride* are thus fully consistent with one another, and with the analysis suggested herein.

3. The particular circumstances present here render interlocutory appeal especially inappropriate. The order appealed from commanded no more than that petitioner pay respondents a sum of money. It is hornbook law that the temporary loss of money does not ordinarily constitute irreparable harm. *See Sampson v. Murray*, 415 U.S. at 90. Indeed, the district court has already ordered respondents to refund petitioner's previously-made installment payment, to the extent such payment exceeds petitioner's actual withdrawal liability.

Moreover, the final order of the district court has been appealed. That appeal, rather than the one petitioner has asked this Court to review, will determine whether respondents were entitled to enforce their withdrawal liability demand and whether petitioner will receive a refund of any of the money it paid pursuant to the June 25, 1985, order. This Court's consideration of the issue raised in the instant petition will thus have no bearing on ultimate determination of the parties' respective rights and responsibilities. *Compare De Funis v. Odegaard*, 416 U.S. 312, 317 (1974) (controversy mooted by subsequent events rendering "determination by this Court of the legal issues tendered by the parties . . . no longer necessary.").

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[9] As we have noted, *Baltimore Contractors* is the modern source of the "serious, perhaps irreparable, consequence" standard elaborated in *Carson*. Petitioner neglected to point out, in its citation to *Tokarcik*, that the Third Circuit had cited *Baltimore Contractors* in support of the *Tokarcik* language upon which petitioner relies to demonstrate internal "confusion." Pet. 8.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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